must interpret the statutory term "modification" identically. There is no question, though, that the regulations are not uniform. Whereas the NSPS requirements are triggered only if there is a post-project increase in the hourly rate of emissions from a unit, the PSD requirements are triggered by an increase in a unit's total annual emissions. By requiring that the PSD regulations conform with the NSPS regulations, the Fourth Circuit effectively invalidated those regulations without jurisdiction to do so.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT ON A MATTER OF PUBLIC IMPORTANCE.

A. The Fourth Circuit's Decision Conflicts With *New York v. EPA*, In Which the D.C. Circuit Upheld the 1980 PSD Emissions Test Effectively Invalidated by the Court Below.

The Fourth Circuit's decision is directly contrary to the decision of the D.C. Circuit in *New York v. EPA*, issued nine days after the Fourth Circuit ruled.[4] In rejecting a challenge by industry (including Duke) to the PSD modification regulations, the D.C. Circuit likewise rejected industry's argument that "modification must have the same regulatory meaning for NSR as prevailed for NSPS in 1977 [because] Congress, by a cross-reference, used the same language in both statutory contexts." 413 F.3d at 19-20. The D.C. Circuit's

4. Although *New York* was brought to the Fourth Circuit's attention on petition for rehearing, the court refused to modify its ruling.

decision that EPA is *not* required to use the NSPS hourly emission rate test in the PSD regulations cannot be squared with the Fourth Circuit's holding that the NSPS and PSD regulations must have the same test for modifications. This case therefore presents a conflict between the Fourth Circuit's decision and the authoritative decision of the D.C Circuit, which, as explained below, has exclusive power to review the validity of EPA regulations under the CAA. *See infra* Point II.

B. The Fourth Circuit's Decision Conflicts With the Decisions of Several Other Courts That Have Recognized The Differences Between the Emissions Tests under NSPS and PSD.

The Fourth Circuit's decision upholding the district court's interpretation of the PSD emissions test as necessarily identical to the NSPS emissions test also conflicts with decisions of the Seventh and First Circuits, recognizing that the tests can and do differ. In *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), for example, the Seventh Circuit noted that,

> [t]o determine whether a physical change constitutes a modification for purposes of NSPS, the EPA must determine whether the change increases the facility's *hourly rate* of emission. 40 C.F.R. § 60.14 (1988). For PSD purposes, current EPA regulations provide that an increase in the *total amount* of emissions activates the modification provisions of the regulations. 40 C.F.R. § 52.21(b)(3) (1988).

893 F.2d at 905; *see also id.* at 915 ("unlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year"); *Puerto Rican Cement*, 889 F.2d at 296-99 (1980 PSD regulations triggered even if hourly rate of emissions remained the same).

The Fourth Circuit's decision is also contrary to the decisions of two district courts that have relied on *WEPCo* and applied the PSD modification regulations as written, to require an increase in annual, not hourly, emissions as a predicate for application of the PSD permitting requirements. *See United States v. Cinergy Corp.*, 384 F. Supp.2d 1272, 1277 (S.D. Ind. 2005) ("The Court disagrees with . . . the *Duke* court that the EPA's definition of 'actual emissions,' means that 'a net emissions increase can result only from an increase in the hourly rate of emissions.'");[5] *United States v. Ohio Edison Co.*, 276 F. Supp.2d 829, 863-64 (S.D. Ohio 2003) (proposed change must "result in an increase in emissions, also expressed in tons per year," to trigger PSD).

These decisions reflect a reality that the Fourth Circuit chose to ignore: that the divergent purposes of the NSPS and NSR programs strongly suggest that Congress intended the use of different emissions increase tests under the two programs. The NSPS provisions of the CAA are intended to ensure that new and modified sources use emission controls that are at least as effective as the "best system of emissions reduction which . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). This requirement is the same regardless of the quality of air in the area where the plant is located or the number of sources located in the area. In contrast, the NSR provisions are concerned with maintaining (in the case of PSD) and improving (in the case of NNSR) air quality in areas where new or modified plants are located. For example, the PSD provisions require that the effect of a new or modified source on air quality in the region be analyzed, 42 U.S.C. § 7475(a), while the NNSR provisions

5. The Seventh Circuit has granted Cinergy's motion for interlocutory appeal of this decision.

require such a source to obtain emissions offsets so that total emissions will be sufficiently less after the source begins operation, 42 U.S.C. § 7503(a)(1). No similar requirements exist in the NSPS program.

EPA's regulations simply reflect these differences between the two programs. Because the NSPS program is primarily concerned with the efficacy of emission controls, without regard to the total amount of pollution emitted, the NSPS regulations require an increase in the hourly emission rate as a prerequisite for a major modification. *See* 40 C.F.R. § 60.14(b)(NSPS emissions test based on rate of emissions "expressed as kg/hr"). On the other hand, because NSR is concerned with the total amount of pollution being emitted, a modification that increases total annual emissions triggers NSR requirements regardless of whether the hourly emission rate is increased. *See, e.g.*, 40 C.F.R. § 52.21(b)(2)(i), (3)(i), (21)(i) (PSD emissions test based on *actual* amount of emissions increase expressed in terms of *tons per year*); *see generally* 57 Fed. Reg. 32314, 32316 col. 1 (July 21, 1992) (different emission increase tests reflect "the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR").

C. The Fourth Circuit's Decision is Contrary to *Chevron* and *Alabama Power*, Which Allow EPA to Interpret a Statutorily-Defined CAA Term Differently in the NSPS and NSR Regulations.

The Fourth Circuit's holding that EPA must construe a statutorily-defined term identically in its NSR and NSPS regulations is also contrary to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984), and *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). In *Chevron*, this Court upheld

EPA's authority to interpret a single CAA term differently in its NNSR regulations than it did in its NSPS regulations. At issue was EPA's interpretation of the statutory term "stationary source," under 42 U.S.C. § 7411(a)(3), CAA § 111(a)(3),[6] as it applies to determining whether a physical change at a facility results in an emissions increase that triggers the NNSR modification requirements. EPA interpreted "stationary source" to include all emissions sources located at a single facility and allowing the facility to net (or "bubble") emissions increases and decreases across sources. 467 U.S. at 840. Notably, at the time the NNSR regulations were promulgated, EPA did not allow such netting under the NSPS regulations,[7] in accordance with the D.C. Circuit's decision in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). *See* 45 Fed. Reg. 5617 (Jan. 23, 1980) ("revok[ing] the bubble concept as a means of determining what constitutes a 'modified' source for the purpose of applying new source performance standards").

On petition for review, the D.C. Circuit set aside the NNSR regulations, finding that EPA was required to interpret "stationary source" to preclude netting, as it had done in the NSPS context. 467 F.2d at 841-42 (citing 685 F.2d 718, 726 (D.C. Cir. 1982)). This Court reversed, emphasizing

6. While the CAA § 111(a)(3) definition of "stationary source" is not explicitly cross-referenced in the NNSR provisions, the Court found that "it sheds as much light on the meaning of the word 'source' as anything in the statute." 467 U.S. at 860.

7. As noted above, the NNSR regulations applicable to modifications are in all relevant respects identical to the corresponding PSD regulations at issue here. *Compare* 40 C.F.R. § 52.24(f)(5), (f)(6), (f)(10) and (f)(13) with 40 C.F.R.§ 52.21(b)(2), (b)(3), (b)(21) and (b)(23).

EPA's authority to define a single CAA term differently depending on the regulatory program at issue:

> Our review of the EPA's varying interpretations of the word "source" – both before and after the 1977 Amendments – convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly – not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. . . . Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

467 U.S. at 863-64. Thus, *Chevron* recognized that the same language supported an emission increase test based on plant-wide emissions for modifications under the NNSR regulations and a dramatically different test prohibiting "netting" under the NSPS regulations. The term at issue here, "modification," is defined in the same section of the CAA (§ 111) as "stationary source" and must be governed by the same interpretive rules.

Furthermore, the Fourth Circuit's decision is contrary to the D.C. Circuit's decision in *Alabama Power*, which upheld the bubble concept adopted by EPA under the PSD regulations. 636 F.2d at 400-02. As in *Chevron*, the D.C. Circuit's analysis of the PSD bubble concept determined "what types of industrial changes will be construed as 'modifications' subject to PSD review requirements." *Id.* at 400. As noted above, the D.C. Circuit had previously

held the "bubble" concept to be unlawful under the NSPS regulations. *ASARCO*, 578 F.2d at 329. In holding that EPA was not only allowed but required to implement the PSD requirements differently from the NSPS requirements, the court concluded that "a bubble concept would be contrary to the intent of the NSPS provisions, but such is clearly not the case with regard to the PSD provisions." *Alabama Power*, 636 F.2d at 402. The court explained that, although the statutory definition of "stationary source" applicable under PSD is the NSPS statutory definition found in CAA § 111(a)(3), *id.* at 395, EPA must interpret that definition differently in implementing regulations under the NSPS and PSD programs due to "differences in the purpose and structure of the two programs." *Id.* at 401-02.[8]

II. THE PETITION SHOULD BE GRANTED TO PROMOTE THE INTERESTS IN CERTAINTY AND UNIFORMITY UNDERLYING CAA SECTION 307(b)(2).

The Fourth Circuit's decision deprives the States and the regulated community of certainty about the applicable PSD requirements, contrary to the purpose of § 307(b)(1). The CAA forecloses any challenges to EPA's PSD regulations – which are "nationally applicable regulations" – except by petition for review filed in the D.C. Circuit within 60 days after promulgation of the regulations. CAA § 307(b)(1).

8. The Fourth Circuit erroneously relied on *Rowan Cos. v. United States*, 452 U.S. 247 (1981), a case construing the provisions of the Tax Code. The *Rowan* decision, however, relied upon the explicit Congressional concern for "the interest of simplicity and ease of administration" of the Tax Code, 452 U.S. at 255, which is inapplicable here because of the different purposes behind the PSD and NSPS programs.

Additionally, if a final EPA action "could have been" challenged in the D.C. Circuit, such an action "shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* at § 307(b)(2). The "twin congressional purposes" in enacting § 307(b) were to "insur[e] that the substantive provisions of the [regulation] would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) ("section 307(b)'s clear language and Congress's manifest intent [was] to avoid protracted and inconsistent adjudications over the validity" of nationally applicable EPA regulations), *cert. denied sub nom. Firestone Tire & Rubber Co. v. United States*, 474 U.S. 1070 (1986).

The decision below subverts these purposes and leaves the States unsure of how to fulfill their obligations under federal environmental statutes. States that have relied on the validity of EPA's PSD regulations – including the actual annual emissions increase test for modifications – now face uncertainty about the legality of their state implementation plans ("SIPs"), which incorporate the annual emissions increase test of the PSD regulations. If the Fourth Circuit's decision stands, even after the window for judicial review has closed, the States will no longer be able to rely on the validity of EPA regulations they are required to enforce. The result will be administrative confusion and effort wasted on promulgating state regulations in mistaken reliance on the validity of the federal programs being implemented.

The decision also guarantees, directly contrary to Congressional intent, that federal CAA programs will not be

implemented uniformly across the fifty states. As discussed above (pp. 6-12), the Fourth Circuit's decision conflicts with the decisions of other courts, which have given effect to the differences between the NSPS and PSD emissions tests. Now, though, the PSD requirements applicable in the Fourth Circuit are different from those applicable in the remaining 45 states.

Nor can this disparity be fixed without this Court's intercession. In response to the Fourth Circuit's decision, EPA has proposed to change the PSD emissions test to correspond to the NSPS emissions test in order to cure the serious disparity and confusion created by the Fourth Circuit's decision. *See* 70 Fed. Reg. 61,081, 61,083 col. 2 (Oct. 20, 2005) ("[*Duke*'s] holding creates a potential disparity in the way we interpret the program in the States in the Fourth Circuit compared to States in other Circuits in the country," creating need to "establish a[n emissions] test consistent with the Fourth Circuit's holding"). EPA's decision is structurally unsound, for it effectively supplants the D.C. Circuit's exclusive authority to review the validity of nationwide regulations, instead allowing the Fourth Circuit to dictate the substance of EPA's PSD regulations. Furthermore, even EPA's proposed rule does not satisfy the Fourth Circuit's mandate, for it seeks to maintain certain differences in the NSPS and PSD regulatory definition of "modification" because "[t]here are differences between the two programs." *Id.* at 61,090 col. 2. Thus, not even EPA's proposed rule change will comply with the Fourth Circuit's requirement that the regulatory definitions be identical.

Nor is the mischief created by the decision below confined to the Clean Air Act. Numerous other environmental statutes contain provisions similar to CAA § 307(b), vesting the D.C. Circuit with exclusive authority to review nationwide regulations. *See, e.g.*, 33 U.S.C. § § 2717(a) (Oil Pollution Act);

42 U.S.C. § 300j-7(a)(1) (Safe Drinking Water Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation and Liability Act). The need for uniformity and predictability in the nationwide effort to protect and conserve environmental resources likewise animates these provisions. Unless this Court scrutinizes the Fourth Circuit's arrogation to itself of authority to pass on the validity of environmental regulations, the uniformity and certainty of nationwide requirements applicable under these other environmental laws will also be threatened.

CONCLUSION

For the reasons set forth above and in the petition, the Court should grant certiorari in this case.

Respectfully submitted,

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